

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: VALSARTAN LITIGATION, CIVIL ACTION NUMBER:

19-2875

STATUS CONFERENCE

(By Telephone)

Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101
April 29, 2020

B E F O R E:

THE HONORABLE ROBERT B. KUGLER
UNITED STATES DISTRICT JUDGE
MAGISTRATE JUDGE JOEL SCHNEIDER

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1 (The following took place via telephone in open Court)

2 THE COURT: Hello.

3 MAGISTRATE JUDGE SCHNEIDER: Judge Kugler is here.

4 THE COURT: I'm here. Hello, everybody. Okay.

00:14 5 Listen, before you speak, you have to identify who you are so
6 that Mr. Nami can take all this down. This is going to be a
7 little bit cumbersome, and I hope only a few of you have the
8 need to talk today.

00:15 9 I'd like to start out this conference by asking defense
10 counsel about the status of their clients in China and India,
11 given what's going on in the world and how much communication
12 do you have. Is this an issue? Is it a problem? How is that
13 going?

00:15 14 MR. GOLDBERG: Good morning, your Honor. This is
15 Seth Goldberg for the GHP defendants. I can give you an
16 update on our clients in China. We have, we have facilities
17 in a place called Binhi, China and we have facilities in
18 Shanghai. Both sets of facilities are now up and running and
19 operational. That really happened earlier in April and as a
00:15 20 result we are now in communication with our clients. We're
21 now involved in collecting documents from our clients. Both
22 sets of facilities as we were, we indicated to the Court we
23 would -- we weren't able to do that between January, between
24 January and April, but we've made progress there and, you
00:16 25 know, provided there are no other waives with respect to the

1 Coronavirus, no other Coronavirus interruptions which, of
2 course, we can't know now. We are, you know, we're running
3 and we're fully operational.

4 THE COURT: Well, that's really good news. How about
5 India?

6 MR. TRISCHLER: Your Honor, good morning. This is
7 Clem Trischler. I represent Mylan Pharmaceuticals and Mylan
8 laboratories. Mylan has several facilities both State side
9 and in India. The Indian operations are severely disrupted at
10 the time the country is -- excuse me, is in a nationwide
11 lockdown and as a pharmaceutical manufacturer. However, the
12 Indian facilities are allowed to continue to operate, but
13 they're operating at an extremely limited and reduced
14 capacity. Administrative personnel, non-essential personnel
15 are not at the plant. They're essentially doing nothing other
16 than essential manufacturing operations and so our ability to
17 communicate with the client to obtain documents that are in
18 India has been disrupted and we're not able to do that for the
19 moment. We do, of course, have some operations in the United
20 States and have legal staff that's scattered here in the
21 United States and so we have some communication with the
22 client, but the Indian operations, our ability to speak to he
23 people over in India to get information from India is just
24 essentially nonexistent at the moment.

25 THE COURT: Well, that's what I was afraid of, but

1 there's not much we can do about that. But just, you know,
2 keep on plugging along on with what we have and go through
3 that.

4 I have some general comments I want to make, then I'll
5 have some questions.

6 MAGISTRATE JUDGE SCHNEIDER: Hey, Judge, what about
7 the other, what about the Indian manufacturers? Are they in a
8 similar position?

9 MR. WRIGHT: Your Honor, this is Graham Wright on
10 behalf of Hetero Labs and our Indian facilities are in the
11 same position. They are dealing with limited staff and they
12 are limited to producing essential medicines and ATI's and
13 they are almost in the same position as Clem advised. The
14 ability to, to gather documents, run searches, things of that
15 nature is limited to the limited number of persons who are
16 actually on staff and on-site. Communication is possible at
17 our facility, but our, but our facility is running on the
18 same, in the same waive that Clem said his clients are running
19 on.

20 MS. ALLEN: Your Honor, this is Deborah Allen for the
21 Torrent defendants. Our clients are also based in India and
22 we're subject to the same situation. The vast majority of
23 certainly the people we interact with do not have access to
24 the facilities and to their offices, and communication is
25 severely delayed due to the essentially countrywide lockdown.

1 MS. PRISEL: And this is Jessica for the Aurobindo
2 over in India, and like Hetero and Torrent and Mylan, we are
3 in the same situation. I am trying to continue to communicate
4 with them and get documents from them, but communication is
00:20 5 very, like they said, is very limited. Everybody is working
6 on those waivers.

7 THE COURT: Okay. Anybody else?

8 MS. COHEN: Judge, this is Lori Cohen on behalf of
9 Teva. Although it's not China or India, we do have certain of
00:20 10 our documents that are in other countries multi and we too
11 have limited, you know, ability to communicate related to that
12 group of documents. We are, we are in communication with the
13 Israeli, you know, source of documents that we have certain
14 sets as I mentioned which is a multi set of documents.

00:21 15 THE COURT: Anyone else?

16 (No response)

17 THE COURT: All right. This is Judge Kugler again.
18 We've noticed recently a re-surge in filings in this case of
19 new cases. Be grateful. I guess everybody is on board and
00:21 20 nothing else to do so they just decided to file, file a lot of
21 new lawsuits in this case. I'm not sure why that is, but any
22 of you filing for the first time, welcome. Maybe one of these
23 days we'll get to see you in person. I'm hoping I have some
24 small degree of optimism at the next status conference in late
00:21 25 May. We just might be able to have a courtroom open in

1 Camden. So stay tuned on that. We wouldn't be able to
2 accommodate all of you because we want to keep social
3 distancing, but maybe we can have the leadership come in to
4 Court and the rest of you will have to hook into. Maybe you
5 can listen in. Maybe we can do something like that. But stay
6 tuned on that. I'm, I'm hopeful. We're working towards that.

7 As those of you from out of town may have read, things
8 are really bad in New York, New Jersey but down here in the
9 southern part of New Jersey, and in the Philadelphia region,
10 it's nowhere near as bad as it is up in New York and north
11 Jersey.

12 All right. Now --

13 MAGISTRATE JUDGE SCHNEIDER: Judged Kugler, the
14 people from out of town may not know that North Jersey and
15 South Jersey are different States.

16 THE COURT: Well, they're different countries,
17 actually.

18 (Laughter)

19 THE COURT: All right. I think the point of today is
20 you want to get some direction on where we're going with this
21 case, and it's a difficult case to manage. I've read your
22 submissions. They, both sides are good points that they're
23 raising and I will be making some decisions about where we're
24 going on the future of the case.

25 But before we get there, I want a couple of general

1 observations I want to make and remind you all of, both sides
2 are citing this interesting case the Sixth Circuit on the
3 opioid litigation. It is an interesting case. It's an
4 unusual case. Of course, it's not the Third Circuit. And the
5 holding was not that the Judge had to decide dispositive
6 motions. In fact, the Court found that to be moot at the
7 time. And I think you should remember that I have not
8 prohibited any dispositive motions in this case and we're
9 going to talk about those in a few minutes. I merely deferred
10 them for the time being while we setup and Judge Schneider has
11 done a remarkable job setting up an apparatus or scheme or
12 protocol, whatever you want to call it, administrative,
13 logistical just to get some sense of organization in this case
14 before we can even start talking about the merits of the case.
15 So don't rely on too much on either side of that decision.
16 Also there seems to be, I think, particularly the plaintiffs'
17 side assumption about trials. Let's all remember that without
18 everyone's consent, I have no jurisdiction to try any case or
19 any judgment, enter a judgment in any case which is not filed
20 in New Jersey and over which New Jersey would have personal
21 jurisdiction over the defendants. There's a Direct Filing
22 Order, but let's not forget that the Direct Filing Order was
23 completely without prejudice to either side, plaintiff or
24 defendant, raising objections on personal jurisdiction or
25 venue grounds at a later date. So let's, let's not get lost

1 in thinking that I'm going to be trying any cases. I don't
2 know what's going to be left for me to try when we get to
3 that, but that's down the road and we can certainly talk about
4 that.

00:25 5 The plaintiffs' proposal is we track these cases by
6 manufacturer, and we start with the CHB, the Chinese
7 manufacturer and all the downstream defendants with that.
8 Torrent, Teva, Amerisource, Cardinal, McKesson, and then Noel.
9 We go down the line.

00:26 10 So who wants to speak on behalf the Plaintiffs'
11 proposal?

12 MR. SLATER: Hello, your Honor. Adam Slater.

13 THE COURT: Okay.

14 MS. SLATER: I hope everyone's well down there. I'll
00:26 15 speak briefly, and then obviously my colleague, my colleagues
16 should have the opportunity as well.

17 I think that, you know, based on what your Honor said,
18 and I'm not sure, you know, what you're thinking is. So I
19 don't want to presuppose or to get ahead of myself. So just,
00:26 20 you know, a brief response to what your Honor said.

21 There's one defendant, one group of defendants that is
22 based in New Jersey, so we wouldn't have jurisdictional issues
23 with which would be the HP and as a finished dose ambient
24 (sic) PI manufacturer. So, in this effort what we could do in
00:26 25 in, in the near future and not have to worry about Lexicon

1 issues or jurisdictional issues that would potentially, I'm
2 sure I'm not telling you anything you don't know.

3 As far as the rest of what you said, you know, our, our
4 view is, you know, we're, we're ready to move forward and at
5 whatever pace the Court wants us to and whatever sequence the
6 Court wants us to. And, you know, we're sensitive to the
7 issues everyone's dealing with. We're also obviously on the
8 plaintiffs' side dealing with it too. We just want you to
9 know, as we told Judge Schneider two weeks ago that we've,

10 we've setup a remote structure for our PSG where we're working
11 very efficiently together in terms of review of documents and
12 are ready, you know, and whatever documents come in. We've
13 setup already have webinars with our entire document review
14 teams and put our coding in place, so that we're ready when
15 the documents do come in to start to review them and, and work
16 with them. And, you know, at whatever pace they come in,
17 we're ready for them.

18 I want to defer obviously to my colleagues as well
19 because I know we're on the phone. This is a bit of a limited
20 time. So if anyone else wants to add to that, I'll certainly
21 hand it off now.

22 THE COURT: Before you do, may I ask you a question,
23 Mr. Slater? This is Judge Kugler.

24 Page three, you have a series of bullet points of your
25 March ninth letter? Would you say this is a synopsis of all

1 the likely claims that the Plaintiffs have?

2 MR. SLATER: I mean we certainly tried to give an
3 overview. You know, I certainly never want to say it was the
4 complete and final disk, but we certainly would try and give
5 an overview of how we thought the case, you know, was
6 structured and what we thought were the central claims, the
7 ones that would be easiest to manage. And again when we wrote
8 that letter, it was in the world where we were thinking about
9 sort of a broader approach to things and we're trying to
10 figure out if we were at a group stage with similar law, you
11 know, which would be the causes of action in claims that would
12 be easiest to manage on the larger, you know, group basis.

13 So that was really our thinking on that. But I think
14 it's a pretty good synopsis of what we think are the essential
15 claims, the issues.

16 THE COURT: I don't mean to bind you to that.
17 Obviously things can change over time. I just was wondering
18 to make sure that this is what we're talking about today.

19 Does anybody else want to speak on behalf of the
20 plaintiffs?

21 (No response)

22 THE COURT: All right, apparently not. That's fine.
23 But back to you, Mr. Slater. You know clearly some of the
24 defendants have some defenses than others that might not have
25 and much of it may be dependent on specific State laws as to

1 about a specific defendant. Why wouldn't it be helpful to
2 find that out, sort that out new?

3 MR. SLATER: Well, I think, I think the question
4 really is, you know, whether or not the Court wants to
5 essentially have a briefing, an argument phase on -- and I,
6 and I don't know how wide of a scope of defendants. I'm
7 taking the question to mean, you know, cross all levels of
8 defendants in all States. I think that certain information
9 will be needed, but it would be I think somewhat inefficient
10 if we were to track all of that for all of the defendants,
11 whereas I think that if we focused on which defendants and
12 which States we're going to focus on in the near term, I think
13 it let's us do a lot more in a shorter period of time to
14 advance the ball on that grouping, much further along to a
15 class certification and closer to a trial date and which would
16 bring with it dispositive motion practice by necessity. And I
17 think that the information that we would all get from the
18 resolutions of those motions and how the Court rules, it may
19 not be identical in every other State, but certainly that work
20 would give everybody the information that would get us farther
21 along in understanding what's the likely outcome in other
22 States. What if -- you know, where will the different
23 groupings fall. And as to defendants who may otherwise never
24 ever need to come before the Court for actual briefing and
25 resolutions of those issues because if the early phase

00:31 1 provides enough information and guidance, which I think it
2 would, we can avoid having to handle all the briefing and all
3 the arguments for what I'll call peripheral or later stage
4 defendants and State and claims that the Court does not
5 otherwise need to actually address substantively again because
6 the first phase if it's run the way that we envision it I that
7 we're hoping that we can, you know, communicate that so much
8 information that reasonable people on both sides, you know
9 will have to understand, you know, this is where things are
00:31 10 likely to go with these other States and with these other
11 defendants and these other claims.

12 THE COURT: Well, look that's a good point and I
13 appreciate that but -- and, you know, from day one I've said
14 let's find a way to protect those what I call peripheral
00:32 15 defendants from having to get bogged down in all this and that
16 is one way to do it. But on the other hand I look at this and
17 I think, well, how do we figure out who the class and sub
18 classes unless we know which defendant is liable or for which
19 thing that they allegedly did. If we start certifying general
00:32 20 classes and then if we then decide whether as a matter of law
21 a certain defendant is liable in this State but not that
22 State, then don't we have to re-mix all the classes and
23 sub-classes?

00:32 24 MR. SLATER: The way that we envision it, I think
25 that we can, we can start in certain -- in terms of actually

1 getting to the disposition. I mean the class certification
2 obviously is not a merited stay, you know. So we don't have
3 to worry about that so much on the class certification phase
4 as opposed to when, when -- for example, our proposal is to
5 start with the HP. It, it seems to make sense to us because
6 the way that this query had been structured, this litigation,
7 we really prioritized the manufacturing level discovery.
8 That's -- and for obvious reasons, going back to the first
9 case management conference because that is where the, the
10 contamination issue originated and that's where the
11 contaminated drugs originated from. So it made a lot of sense
12 to focus on that and our focus has been there throughout the
13 litigation. So we've put in place in terms of the discovery
14 structure a mechanism to identify, for example, what happened
15 and why it happened so we can look to really the guts of the
16 these claims. And we've also looked at and we've also looked
17 at and we're really focused now quite a bit on prior
18 identification figuring out on how we track the stuff. The
19 lower levels of the chain, which are the, which are the
20 wholesalers and the retailers, that's part of the process, you
21 know, frankly is lower and more bogged down and there's a
22 macro briefing process that's going to end at the end of next
23 month likely with some decisions on that and then that
24 discovery have to be scheduled. That's, that's pretty behind
25 far. So if you look at the factual level, really the central

1 location in this litigation, then when you look at the HP, the
2 reason we've looked at them is for a few reasons. One of
3 which is it's our understanding they have the largest market
4 share. So you're going to cover as much as possible of the
5 country of the market in one shot as you can in the first
6 shot. Number two, they're located in New Jersey, so we don't
7 have any personal jurisdiction issues with that. We don't
8 have to worry about any of that because they're here. So --
9 and, and they're also an integrated levels of both API and
10 finished dose manufacturers. So, again, those issues can be
11 addressed. In fact, to the extent we're taking discovery from
12 in Solco which is their United States wholesaler/distributor.
13 So we're getting a lot of information from that. So there's a
14 lot of economies to focus in here at all those different
15 levels. And, and, and you're right, your Honor, another
16 defendant who is in a different part of the country, you know,
17 there's going to be a question, well, what do we do with them,
18 and, and I really do think that as this process starts to play
19 out as we start to see this start to become more granular,
20 it's going to become clear the best way to start to address
21 those issues down the line and I think that again whatever
22 your Honor does with this first set of issues is going to have
23 significant impact and provide significant information to
24 everybody across litigation to be able to see where are things
25 going and how would things be likely handled down the line as

00:36 1 opposed to handling everything at once which is I think will,
2 will put us in a very, you know, in a phase that will take a
3 long time and we'll need discovery from everybody. I mean if
4 we're going to address particular defenses or particular
5 defendants that may never really need to come to the front of
6 the line, that they're going to come on a briefing level that
7 makes us do all the discovery. And, for example, we hear the
8 issues with the Indian entities. They're not, they're not
9 part of the DHP, API process. So -- and there's other
00:36 10 defendants that may have other issues. We don't have to deal
11 with all of those complications, whereas we can focus smaller
12 and get a lot of information that we, I think, can use more
13 efficiently across the board. I hope I answered your
14 question.

00:36 15 THE COURT: You have. Thank you. All, all good
16 points, of course. Any other plaintiffs' counsel want to be
17 heard before I turn to defense counsel? Mr. Goldberg?

18 (No response)

00:37 19 THE COURT: Apparently not. Well, look, there are no
20 perfect answers here. This is such a sprawling case with so
21 many different claims in it. But there are no great answers
22 but we're going to struggle through this the best we can.
23 It's going to take time. I think in response to Mr. Slater's
24 concern about taking discovery from this one and that one and
00:37 25 defendants' concerns about having to give up is very wrong.

1 You know, Judge Schneider can certainly focus on the discovery
2 to the needs at the time and as he has been doing and we'll
3 just -- we can phase these things and try to protect
4 everybody's interest.

00:37 5 All right. The defendants say look, let me have a shot
6 under Rule 12 to cleanup some of this junk, but I assume,
7 therefore, that defendants at this stage, I'm not too worried
8 about one way intervention. Correct, Mr. Goldberg?

00:38 9 MR. GOLDBERG: Your Honor, the question about one way
10 intervention is, is dependent on how the Court proceeds with
11 vis-a-vis the proposal that defendants have set forth in the
12 proposal that Plaintiffs have set forth. You know, the way,
13 the one way Intervention Rule works is if class members can
14 opt out of a Class Action after a liability decision, or if
00:38 15 the opt out question is posed after the liability
16 determination, then, then the unfairness has -- that, that is
17 not fair to the defendants. That decision -- okay. Go ahead.

00:39 18 THE COURT: I understand that. But, you know, Rule
19 23 was changed to protect defendants from that issue, that
00:39 20 problem. But here if they go along with this and if I do
21 grant some of these motions to dismiss, it's not going to be
22 binding on all the plaintiffs. In a way, the way we deal with
23 this is that let's say a specific defendant gets a specific
24 decision as a matter of law, they're not liable for X, Y and
00:39 25 Z. Well we just issue an Order to Show Cause as to all the

00:39 1 remaining Plaintiffs in the same situation as to why we
2 shouldn't extend it to them. But if you are the one who is
3 seeking to make these motions, then you are in essence
4 waiving. At this point I know you raised it later with class
5 certification and all that, but you're at this point waiving
6 any concerns you have about that problem anyway.

00:40 7 But let's turn on page two. You have all these bullet
8 points. These are motions, apparently, the defendants want to
9 raise. And I have some questions about some of these. I'll
10 weigh in on information about some of this stuff.

00:40 11 The first one is personal jurisdiction. We talked
12 about this before. There's no question in my mind that there
13 are probably some defendants currently in this case that are
14 from the District of New Jersey has more jurisdiction. But
00:40 15 remember the plaintiffs didn't choose this Forum. I don't
16 know if I have the authority of the judgment against those
17 over whom I have no personal jurisdiction. So it would never
18 happen anyway. I don't think, as I said about the Direct
19 Filing Order, it's completely without prejudice to raising
00:40 20 these issues at a later date. Certainly the defendants will
21 have an opportunity to raise the issue of personal
22 jurisdiction at the stage of the case where they need, they're
23 going to be going to trial or things of that nature, at
24 whatever jurisdiction where they end up. But I think and as
00:41 25 I've had indicated informally before with counsel. As I read

00:41 1 the rule of the law on personal jurisdiction, it's highly
2 likely that I won't dismiss it anyway. I will just transfer
3 it to the jurisdiction that has jurisdiction, personal
4 jurisdiction over a specific defendant like if it's a
5 corporation, you know, where their locus is and where their
6 State of corporation is which would only trigger that probably
7 the plaintiffs to apply to the MDL panel to send it back to
8 the MDL here for purposes of discovery. We're not going to go
9 there.

00:41 10 The second point you raise. The plaintiffs who did not
11 suffer any physical injury from taking Valsartan have
12 standing.

00:42 13 Who are these people? Can you give me an example of a
14 plaintiff who didn't suffer a physical injury. Who are we
15 targeting here?

00:42 16 MR. GOLDBERG: Yes, your Honor. Any of the
17 plaintiffs, all of the class members in the economic loss
18 claim, all of the class representatives who are serving an
19 economic loss claim. None of those class representatives or
20 class members are asserting that they experienced a physical
21 injury as a result of ingesting any of the defendants'
22 Valsartan. The physical injury plaintiffs are the ones who
23 are proceeding under the Personal Injury Master Complaint.
24 Plaintiffs who did not suffer a physical injury are claiming
00:42 25 simply that the price they paid for Valsartan that was

1 contaminated should be refunded.

2 THE COURT: Right.

3 MR. GOLDBERG: When -- go ahead.

4 THE COURT: Isn't the payment of money sufficient to
5 confer standing?

6 MR. GOLDBERG: Well --

7 THE COURT: Why wouldn't it be sufficient to say,
8 look I paid this person five dollars and they really -- they
9 shouldn't have taken the money. They really owe it back to
10 me. Whether it's true or not, it's irrelevant. But doesn't
11 that give you standing to come to Court to seek redress?
12 Isn't that something a Court can do, can order the money
13 refunded to you?

14 MR. GOLDBERG: Your Honor, under the precedent in the
15 Third Circuit, it is not because those claimants have received
16 the benefit of the bargain. They have not suffered an injury
17 from paying for a product, ingesting the product and the
18 product has performed as it was intended to perform.

19 THE COURT: Well, aren't they saying, though, Mr.
20 Goldberg, that I wouldn't have paid for this product had I
21 known it was contaminated? I'm not getting the benefit of my
22 bargain because I would have never made this purchase had I
23 known the real story about this stuff.

24 MR. GOLDBERG: That may be what the plaintiffs are
25 claiming, but that is not what the law says they need to

00:44

1 allege. What they need to allege is that the product was not
2 as safe or effective. That there was not some alternative
3 product that would have performed better. They're merely
4 claiming that the product was not worth what they thought it
5 was worth is not sufficient under the Third Circuit precedent.

00:45

6 THE COURT: Okay. The next one is the plaintiffs
7 have paid the same co-pay for similar drugs have standing.
8 I'm not sure -- I don't know what you're talking about. Give
9 me an example of that.

00:45

10 MR. GOLDBERG: Sure. If a plaintiff that purchased
11 Valsartan and paid a fifteen dollar co-pay were to, were to
12 have switched to a different drug that was not allegedly
13 contaminated and would have paid the same fifteen dollars for
14 that drug, then how were they injured by -- they would have
15 paid the same fifteen dollar payment if there was an alternate
16 drug.

00:46

17 THE COURT: Okay. But how do we know that's true in
18 any circumstance? In other words, how can, how can the Court
19 decide that on a Rule 12 motion?

00:46

20 MR. GOLDBERG: Well, the Court can decide that as a
21 matter of law and say that any plaintiff who would have paid
22 the same co-pay that they paid for Valsartan for an
23 alternative blood pressure drug could not have been injured by
24 the allegedly impure Valsartan sold by defendants. Same with
25 the fact that no physical injury. That's a legal decision the

1 Court could render.

2 THE COURT: But don't the plaintiffs just get around
3 the latter by saying, by alleging that they wouldn't have
4 bought the other product, or it wouldn't have had the same
5 co-pay. I mean how do we even find out?

6 MR. GOLDBERG: Well, certain -- how did we ever find
7 out, as, if as a matter of law plaintiffs would have paid the
8 same co-pay have no claim. That's something then that the
9 plaintiffs need to then determine which of their class

10 representatives would fall within that bucket because those
11 class representatives can no longer represent the class. The
12 class would have to be defined such as to exclude those class
13 members. Right now you're -- these two things are legally a
14 good example of why you have to make these rulings early

15 because right now the way the Class has been defined, it
16 covers five or six years if it's being brought through to
17 today. Any consumer of Valsartan at any time. So, somebody
18 who bought Valsartan in 2016 took their entire bottle, their
19 blood pressure went down, they got all the benefit of that

20 drug, and then they never took Valsartan again, that person
21 would be in the class to try to get a refund for that bottle
22 that they, that they consumed in its entirety with no adverse
23 effect back in 2016. The class would also include Plaintiffs
24 who would say, look, you know, I would have switched to a
25 different drug and the payment would have been the same. So

00:49 1 how are you injured. The purpose of the Rule 12 motion and
2 some of these issues narrow the scope of the Class and they do
3 this as to any Class that would be asserted. So, you know,
4 the Court ended up taking the Plaintiffs up on this, you know,
5 four separate Class Action proceedings proposal, these kinds
6 of issues would narrow the Class, narrow the Classes for all
7 four tracks.

00:49 8 THE COURT: So what you're seeking then under this
9 bullet point is an opinion from the Court that you, the
10 plaintiff, would have had the same co-pay for a similar drug
11 that would have had a similar result on your health, then you
12 have no claim. Correct?

13 MR. GOLDBERG: Correct, your Honor.

00:50 14 THE COURT: Without reference to any specific
15 plaintiff. Just anybody in the world out there who has or
16 would have taken another drug for a similar result and not
17 paid the co-pay, that you're barred from ever filing suit.

00:50 18 MR. GOLDBERG: Well, we're saying that in this case
19 plaintiffs who have paid, would have paid the same amount for
20 a similar drug, did not experience an injury by paying that
21 amount for Valsartan.

22 THE COURT: Okay. All right, I think I understand
23 where you're going. I think you understand my reservation.
24 It's almost like an advisory opinion.

00:50 25 But anyway, let's turn to the next one. FDCA

1 preemption of the claims that the allegation that Valsartan
2 was worthless. Tell me more about that, please.

00:51 3 MR. GOLDBERG: The FDA has not taken Valsartan off
4 the shelves. When the FDA -- when the, when the defendants
5 recalled the drug, the FDA instructed that patients who
6 continued to take Valsartan, if they have it and by definition
7 it is then not worthless. Meaning it has no value. And it is
8 the Food, Drug and Cosmetics Act and the determination that
9 the FDA makes under the Food, Drugs and Cosmetics Act,
00:52 10 preempted the claim that the drug is worthless.

11 THE COURT: I'm curious as to how I come to that
12 determination under a Rule 12 motion. Don't you have to get
13 into the facts that the recall and what's left on the shelf
14 and all that which is not going to be part of the pleadings in
00:52 15 the case, I don't think?

16 MR. GOLDBERG: Well, those facts are part of the
17 pleadings, your Honor. Those facts are throughout the
18 pleadings. And, and the court can take judicial notice of the
19 fact that the FDA instructed patients to continue to take the
00:53 20 drug, notwithstanding the recall and that the FDA is
21 conducting an investigation into, into the cause of the
22 impurities.

23 THE COURT: Okay, I understand what you're saying.
24 Lets look at as to what that to do with FDA's primary
00:53 25 jurisdiction. I understand that.

1 The next one. Does FDA approve labeling. Preempt
2 liability. I understand what you mean by that.

3 The next one, do innocent seller statutes preclude
4 claims against downstream defendants. How many States do you
5 estimate have such statutes?

6 MR. GOLDBERG: That's a good question, your Honor.
7 I've not focused on that specific question, the number of
8 States that have those statutes.

9 THE COURT: Well, do you think it's more than one?

10 MS. JOHNSTON: Your Honor, this is Sarah Johnston for
11 the retailer defendants. I can jump on that if it would be
12 helpful.

13 THE COURT: Please.

14 MS. JOHNSTON: I believe it is a majority of the
15 States have a statute that would fall into the umbrella of
16 innocent seller. They vary from State to State, but they're
17 -- I don't have the exact number, but I do know that there's
18 many, many States that have some variation of this that apply
19 to the downstream and to the supply chain.

20 THE COURT: Okay. Thank you. The next one is which
21 States recognize Warranty Actions for pharmaceutical products.
22 And my question, is there a converse to that, that is, there
23 are States that don't recognize warrantee actions for
24 pharmaceutical products?

25 MR. GOLDBERG: Your Honor, I believe, I believe that

1 is correct. I certainly would ask my colleagues to join if
2 they know of those specific States. Many of the States that
3 those claims would be subsumed by Products Liability Statutes.

4 THE COURT: Well, I think New Jersey would be one of
5 them.

6 MS. JOHNSTON: Yes, your Honor. This is Sarah
7 Johnston again. And it would be similar as to the New Jersey
8 Product Liability Act and there are numerous States. Off the
9 top of my head I know that Indiana, Tennessee, Illinois,
10 multiple others that have their own products liability
11 statutory schemes that would subsume all individual claims as
12 to a defective product.

13 THE COURT: Thank you. The last bullet point is:
14 Did manufacturers warrant impurity-free Valsartan. I'm not
15 sure, Mr. Goldberg, what that means. What are you getting at
16 here?

17 MR. GOLDBERG: Sure. The -- you know, no
18 manufacturer warrants that their products will be manufactured
19 and sold without impurities and the FDA permits and allows for
20 the fact that there will be impurities in products. It's --
21 you know, what is in some cases what is the level of the
22 impurity that matters. But none of the defendants in this
23 case warranted that their Valsartan would be free of
24 impurities. In this case, in particular, the MDMA was an
25 impurity that no party, neither the defendants nor the FDA had

1 identified as potentially being an impurity in Valsartan
2 because prior to 2018, none of the defendants, nor the FDA had
3 the testing specificity to identify MDMA in the manufacturing
4 process.

00:58 5 MAGISTRATE JUDGE SCHNEIDER: You might get
6 disagreement from plaintiffs about that. But I suppose when
7 they have a chance to speak, they might address that issue.

8 THE COURT: All right. Mr. Goldberg, is there
9 anything else you or any defense counsel want to say in
00:59 10 support of your proposal that we proceed at this time with
11 Rule 12 motions.

12 MR. GOLDBERG: Well, your Honor, if you're only
13 talking about the Rule 12 motions, we have a lot to say about
14 plaintiffs' overall proposal. And this notion of having four
00:59 15 separate Class Certification tracks and the efficiencies with
16 respect to replicating the Class Certification four separate
17 times at a minimum which would include not just the Class
18 Certification motions, but the hearings, the Daubert issues
19 the Court would have to go through, the complete notice, an
00:59 20 opportunity to opt out for each one of those Classes before
21 the Court could get to a trial on an economic loss pace. On
22 those issues, we would like to be heard more and I'd be happy
23 to cover those if your Honor would like to hear that.

24 I also would like to address some of the GHP specific
01:00 25 points that Mr. Slater made. But as for Rule 12, I think

01:01 1 these issues really identify the fact or certainly help to
2 underscore the fact that there are many claims and many
3 defendants that may be eliminated from this case through Rule
4 12 motions and that that, that narrowing will enhance the
5 efficiency of the MDL overall which is what all of the
6 precedent supports. It would narrow the discovery to the
7 information that's relevant to the claim that would ultimately
8 be tried.

01:01 9 So, with respect to Rule 12, we've covered this a
10 number of times over the last fifteen or sixteen months that
11 defendants really believe that the time to have those motions
12 heard is as early as possible in the litigation. You know,
13 we're already at a point, your Honor, where the manufacturer
14 discovery which is in response to a hundred and 20 or so
01:01 15 document requests, even one manufacturer Mylan, for example,
16 has already, has already pulled information suggesting that
17 there are, you know, five terabytes of information responsive
18 to just those document requests. And, you know, the discovery
19 that has been agreed to or ordered by the Court so far is not
01:02 20 necessarily information that's going to be relevant to the
21 claims that are ultimately tried once the Court resolves some
22 of these issues on Rule 12.

01:02 23 But, you know, I would like to address the notion, your
24 Honor, of these four separate tracks because I think that
25 there's a bit of a gloss over here.

1 THE COURT: Mr. Goldberg, let me --

2 MR. GOLDBERG: Yeah.

3 THE COURT: Let me interrupt you. You don't need to.
4 We're not going to get there. I appreciate what you've
5 written, and I understand your objections, but I'm not going
6 to -- we're not going to get to the Certification yet.

7 I am going to permit the defendants to file Rule 12
8 motions at this time, except that of personal jurisdiction.
9 But you're going to have to be very specific as to what claims
10 and what plaintiffs and what cases that your motions are
11 referring to. When that's done and when I decide those, the
12 next step will then be Class Certification. Both sides have
13 really good points they've raised about Class Certification
14 issues which we will deal with at that point in time. But I
15 do believe that decisions on the Rule 12 motions will help us
16 better to defined the Classes and Sub-Classes that we're
17 ultimately going to have to deal with at the appropriate time.
18 But as I said, there's no perfect answers here. And I

19 understand, Mr. Goldberg, the defendants' complaint that the
20 discovery requests are over-inclusive, but there is no way to
21 avoid most of this. It's just what happens in these kinds of
22 cases. We're just going to have to deal with it and live with
23 it and I'm confident Judge Schneider can reign it in when it
24 gets out of hand, if it gets out of hand. We're all obviously
25 all aiming towards the day of reckoning which is going to be

01:04 1 the Daubert motion when the Court's going to be called upon to
2 decide the experts and the General Causation issue and who can
3 testify about that or not. That's a little down the road.
4 Let's get through these motions to dismiss and then as soon as
5 that's over, let's then key up Class Certification issues.
6 We'll get those resolved and we'll get on with the case. We
7 are not going to postpone any discovery while the Court is
8 considering these Rule 12 motions.

01:05 9 What I would like to hear from both sides now is a
10 proposed time table for filing these motions and filing
11 responses to these motions. How long do you need? We'll
12 start with the defense counsel. Give me a proposal as to how
13 long do you need before you can file these motions. And I
14 understand there's a comprehensive and going to be lengthy
01:05 15 motions. But give me some ballpark here as to when you think
16 you can get those submitted.

01:05 17 MR. GOLDBERG: Your Honor, I haven't polled all of
18 the defendants, obviously, and I think given the circumstances
19 with the Coronavirus but would like to do that, but I do
01:05 20 think, you know, our filing the opening motion to dismiss 60
21 days from now which will give the parties time, all of the 50
22 parties time to get with their clients, understand what
23 issues, give us time to sort through these many different
24 issues that need to be filed, that need to be briefed and do
01:06 25 it in an efficient way in an Omnibus motion, I would think 60

1 days should be, should be enough time.

2 THE COURT: Well, let's do this. How about I suggest
3 this. Why don't we focus on July 1st as the filing date, but
4 for the balance of the week, why don't both sides talk to each
5 other. If you want to submit a proposed joint -- I mean a
6 joint proposal to the Court as to the dates for filing
7 opposition replies, that's fine. You can send that in to us
8 and we'll look it. But let's focus on July 1st then as a
9 proposed beginning of this process so we can get those briefs
10 to the Court and we can do that. And I think that leaves an
11 issue that the defendants have raised about some discovery
12 issues. Correct?

13 MR. GOLDBERG: Your Honor, I -- go ahead, Clem.

14 MR TRISCHLER: I apologize. Your Honor, Clem
15 Trischler. I was simply going to answer your question say,
16 yes, we have raised discovery issues with respect to the scope
17 of the ESI search terms. We had some discussions with Judge
18 Schneider about that in our conference of April 15th. And we
19 do think it's important to move forward with a resolution on
20 that, even through a meet and confer process which we are
21 attempting or through application to amend those search terms
22 if necessary.

23 THE COURT: Why don't I turn this over to Judge
24 Schneider and you can talk to him about that right now. Okay,
25 Judge Schneider?

1 MAGISTRATE JUDGE SCHNEIDER: Yeah, I'm here. What I
2 suggest is, I'm not sure if today's call is the appropriate
3 time to address this issue because you want to continue
4 meeting and conferring with plaintiffs. I do take issue,
5 counsel, however, with the statement in the brief that Mr.
6 Goldberg submitted that the December Order the Court entered
7 was the "Initial Search Term". I don't know where that notion
8 came from. We spent months and months and months working on
9 that Search Terms and it certainly wasn't the Court's
10 intention that that would just be the starting point of the
11 Search Term to be used. It's the Court's contention that
12 those were the final Search Terms, but I agree with you that
13 I've said it from day one and I continue to say if there's
14 good cause to change it, we'll change it, but I don't think
15 it's accurate to say they were "Initial Search Terms". My
16 suggestion would be meet and confer, looking at the calendar
17 we'll have a conference call on May 13. We can address
18 whatever issues you want to address on May 13 or if we have to
19 push it back to the general meeting which is probably going to
20 be scheduled on May 27th and deal with the issue at that time.
21 But I certainly agree that we ought to give you an opportunity
22 to talk with the plaintiffs about whether there should be
23 appropriate modification of those Search Terms. I think
24 plaintiff has as much interest as you do in not wasting time
25 and money reviewing tens of thousands of irrelevant documents.

01:10 1 So it may be that plaintiff will agree with you. I notice
2 that plaintiff apparently wants some additional information
3 from the defendants to force the meaningful discussion. So,
4 again, you ought to meet and confer with them about that and
5 see if you can come to a resolution. Nothing would delight me
6 more than if you can come to an amicable, both, resolution of
7 whether a Search Term should be modified or not.

01:10 8 So the bottom line is I think we ought to just defer
9 this until May 13th on a call and see if you can work
10 something out before then.

11 MR. TRISCHLER: Your Honor, this is Clem Trischler.
12 That's, that's certainly acceptable to the defendants. Just
13 to follow-up on a few points that you made.

01:10 14 I do -- I did see in the agenda statement that the
15 plaintiffs where they indicated they were looking for some
16 information, additional information to evaluate the
17 counter-proposal. Frankly, that information was, much of that
18 information was provided on March 31 and again on April the
19 15th. But I certainly agree that we need to confer in trying
01:11 20 to resolve this is reasonable and we can engage in that
21 process until May 13 and report to the Court where we are at
22 that time.

23 MAGISTRATE JUDGE SCHNEIDER: Perfect.

01:11 24 THE COURT: All right, it's Kugler again. Do you
25 have anything else you want to discuss today in this meeting?

1 MR. SLATER: I don't think anything from plaintiffs,
2 your Honor.

3 MR. GOLDBERG: Nothing from defendants, your Honor.

4 THE COURT: All right, May 27 then. We'll let in
5 everybody. Let you know whether or not you can do it here or
6 do it again on the phone. And I want to ask Mr. Goldberg and
7 Mr. Slater, will you stay on the phone a minute while everyone
8 else leaves. I want to talk to you about another matter, if
9 you don't mind.

10 MR. SLATER: Of course.

11 MR. GOLDBERG: Yes.

12 THE COURT: With that, good bye. Stay safe and stay
13 well. Thank you.

14 (The matter was then concluded)

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1 I certify that the foregoing is a correct transcript from
2 the record of proceedings in the above-entitled matter.

3
4 /s/ Carl Nami, Official Court Reporter

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6 Court Reporter/Transcriber

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